No. 79-1144

In the Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC., PETITIONER

v.

RADCLIFF MATERIALS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a right to contribution among co-conspirators should be implied under the antitrust laws.

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INTEREST OF THE UNITED STATES

The United States, which has the primary responsibility for enforcing the antitrust laws, has a substantial interest in ensuring the continuing efficacy and deterrent effect of private actions under Section 4 of the Clayton Act, 15 U.S.C. 15. See, *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 344 (1979). Moreover, because the creation of a right to contribution may deter settlements and burden already complex litigation, the United States has a direct interest in this case as a potential plaintiff under Section 4A of the Clayton Act, 15 U.S.C. 15a.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, which involves a claim that petitioner and others conspired to fix the price of ready-mix concrete in violation of Section 1 of the Sherman Act, 15 U.S.C. 1,[1] the court of appeals held that there is no implied right to contribution among co-conspirators under the antitrust laws (Pet. App. A-1 to A-19).[2] The court reasoned that "[t]he chance that a participant [in a conspiracy to violate the antitrust laws] may be faced with a full judgment is more likely to discourage anticompetitive conduct than would ensuring that each participant pays only some fair share" (*id.* at A-7). The court further observed that permitting antitrust defendants to seek contribution might well render such cases unmanageable (*id.* at A-17 to A-18). For these reasons and the reasons stated more fully below, we submit that the decision of the court of appeals, which is consistent with the overwhelming weight of authority, is correct.

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[1] Petitioner has previously pleaded *nolo contendere* to an indictment charging a criminal violation of Section 1. See Pet. App. A-2 n.2.

[2] Judge Morgan dissented (Pet. App. A-19 to A-24).

In contrast to other federal statutory schemes, the antitrust laws do not expressly provide for a right to contribution. Furthermore, the pertinent legislative history is barren of any indication that Congress sought to spread the impact of the treble damages remedy among antitrust conspirators or was otherwise concerned with the rights and remedies of those who violate the antitrust laws. That silence strongly indicates that Congress did not intend to permit co-conspirators to seek contribution from each other, because both the Sherman and Clayton Acts were enacted against a common law background prohibiting contribution among joint tortfeasors. More recently, Congress has considered proposals concerning whether and in what manner contribution should be permitted, but it has declined to date to permit such claims. Particularly since the question of contribution involves the weighing of many essentially legislative issues, this Court should not create an implied right to contribution under the antitrust laws.

At all events, implication of a right to contribution would not further the twin goals of compensation and deterrence that underlie the antitrust laws. To the contrary, permitting antitrust defendants to seek contribution might well undermine the deterrent effect of treble damages actions, especially in horizontal price fixing cases. In addition, the litigation that would be involved in determining relative rights to contribution would impose substantial burdens on the federal courts and could delay the compensation of antitrust plaintiffs. In short, recognition of a right to contribution would have a substantial adverse impact on the enforcement of the antitrust laws. In the absence of legislative guidance, debatable notions of fairness do not justify that result.

ARGUMENT

THE FEDERAL ANTITRUST LAWS DO NOT PROVIDE A RIGHT TO CONTRIBUTION

The issue in this case is whether an antitrust defendant who is subject to treble damages liability under Section 4 of the Clayton Act, 15 U.S.C. 15, may seek contribution from a co-conspirator. As we have discussed at length in our amici curiae brief in *Northwest Airlines, Inc.* v. *Transport Workers of America, AFL-CIO*, No. 79-1056, Oct. Term, 1980, at 6-15,[3] a right to contribution among joint tortfeasors was not recognized at common law, and, with the exception of admiralty jurisprudence,[4] the adoption of one form or another of contribution has generally been a legislative, not a judicial, phenomenon. Indeed, because contribution rules implicate competing policy considerations such as deterrence, fairness, and efficient enforcement, we submit that, at least in the absence of compelling reasons of statutory policy requiring them to do so, the federal courts should not create an implied right to contribution under a particular statutory scheme

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[3] We have served a copy of our brief in No. 79-1056 on the parties to this case.

[4] Accordingly, petitioner's reliance (Br. 12-13) on admiralty cases such as *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974), is misplaced. The Court has repeatedly emphasized that "[a]dmiralty law is judge-made law to a great extent." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 259 (1979). See *e.g.*, *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 409 (1975); *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16, 20 (1963). Thus, "[e]ven though the common law of torts rejected a right of contribution among joint tortfeasors, the principle of division of damages in admiralty has, over the years, been liberally extended by this Court in directions deemed just and proper." *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, *supra*, 417 U.S. at 110. The question here, of course, is the extent of petitioner's rights under a statute. See Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. L. & Econ. 331, 336 (1980).

unless Congress has evidenced its intent to permit such claims. See, *e.g.*, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979); *United States* v. *Gilman*, 347 U.S. 507, 511-513 (1954); *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285-287 (1952). As we now demonstrate, the language and history of the Sherman and Clayton Acts and antitrust policy strongly militate against judicial recognition of a right to contribution.

A. The Language And History Of The Sherman And Clayton Acts Show That Congress Did Not Intend To Permit Contribution Among Persons Who Violate The Antitrust Laws

1. *Statutory Language.* Nothing in the language of either the Sherman Act, 15 U.S.C. 1 *et seq.*, or the Clayton Act, 15 U.S.C. 12 *et seq.*, suggests that there is a right to contribution under the antitrust laws. To the contrary, although Congress has enacted several provisions concerning rights and remedies in antitrust proceedings (see, *e.g.*, 15 U.S.C. 1, 3, 4, 6, 8, 9, 11, 15, 15a, 15c, 15d, 15e, 15f, 16), it has not expressly provided for the right to contribution claimed by petitioner. Particularly since Congress has elsewhere created an explicit right to contribution (see, *e.g.*, Section 11(f) of the Securities Act of 1933, 15 U.S.C. 77k(f) and Sections 9(e) and 18(b) of Securities Exchange Act of 1934, 15 U.S.C. 78i(e) and 78r(b)), this Court should be chary of reading an implied right to contribution into the antitrust laws. See, *e.g.*, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, 444 U.S. at 19-20; *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 571-572; *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974).

Furthermore, the Sherman and Clayton Acts were neither enacted for the especial benefit of those who conspire to violate those statutes nor otherwise intended to

create rights on behalf of antitrust defendants. See, *e.g.*, *Cannon* v. *University of Chicago*, 441 U.S. 677, 689-694 & n.13, 707 n.41 (1979); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 37 (1977). The language of the antitrust laws in general and Section 4 of the Clayton Act in particular show that Congress was concerned with deterring anticompetitive activity and with facilitating the compensation of injured parties, not with allocating liability among co-conspirators. See, *e.g.*, *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308, 314 (1978); *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-486 (1977). Under Section 4, each defendant may be fully liable for "threefold the damages * * * sustained" by "[a]ny person who [has been] injured * * * by reason of anything forbidden in the antitrust laws" regardless of the potential liability of any other co-conspirator. 15 U.S.C. 15. See *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 143-144 (1968) (White, J., concurring); *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 330 (1955); *Solomon* v. *Houston Corrugated Box Co.*, 526 F.2d 389, 392 n.4 (5th Cir. 1976). Thus, far from attempting to guarantee equity among violators, Congress determined severely to penalize those who engage in unlawful anticompetitive conduct. In these circumstances, there is no basis for implying a right to contribution under the antitrust laws. Cf. *Cannon* v. *University of Chicago, supra*, 441 U.S. at 692 n.13; *Piper* v. *Chris-Craft Industries, Inc., supra*, 430 U.S. at 37.

2. *Legislative history.* The history of the Sherman and Clayton Acts does not support petitioner's claims for contribution. We are unaware of any contemporaneous congressional statements directly addressing the issue of contribution. See also Pet. App. A-6; *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,701 (10th Cir. 1979). In light of the statutory language described above, however, such legislative silence reinforces the conclusion that no implied

right to contribution exists under the antitrust laws. See *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 571; *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 64 (1978); *United States* v. *Gilman*, *supra*, 347 U.S. at 511-513.[5] Here, moreover, circumstantial historical evidence affirmatively suggests that Congress did not intend to permit one co-conspirator to seek contribution from another.

The legislative history accompanying the original Sherman Act indicates that the antitrust laws are to be construed against a background of well-settled common law principles and traditions. See *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688 (1978); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 497-500 (1940); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 50-60 (1911); 21 Cong. Rec. 2456-2460 (1890) (remarks of Rep. Sherman). At the time that both the Sherman and Clayton Acts were passed, the common law unequivocally denied any right to contribution among joint tortfeasors. See, *e.g.*, *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, *supra*, 342 U.S. at 285; *Union Stock Yards Co.* v. *Chicago, Burlington & Quincy R.R.*, 196 U.S. 217, 224 (1905); *Washington Gas Light Co.* v. *Lansden*, 172 U.S. 534, 552 (1899); *Chicago City* v. *Robbins*, 67 U.S. 418, 424-425 (1862).[6] It is therefore

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[5] In *Gilman*, the Court unanimously declined to find an implied right to indemnity under the Federal Tort Claims Act on behalf of the United States. The Court explained (347 U.S. at 511-513; footnote omitted):

> [T]he claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.

[6] The initial common law rule against contribution pertained solely to intentional tortfeasors. See, *e.g.*, *Merryweather* v. *Nixan*, 101 Eng. Rep. 1337 (K.B. 1799); *Betts* v. *Gibbons*, 111 Eng. Rep. 22 (K.B. 1834). In this country, the rule was applied in negligence

most unlikely that, in enacting the antitrust statutes, Congress intended to reverse this well settled common law doctrine without specifically so providing. *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, *supra*, [1979-2] Trade Cas. (CCH) at 79,700. See, *e.g.*, *Owen* v. *City of Independence*, 445 U.S. 622, 637 (1980); *United States* v. *Kubrick*, 444 U.S. 111, 119-120 (1979); *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U.S. 531, 545-546 (1978); *Gooding* v. *United States*, 416 U.S. 430, 457-458 (1974).

3. *Recent antitrust legislation.* Subsequent legislative events also support the conclusion that implication of a right to contribution would conflict with the congressional intent in forming the antitrust laws. In 1974 and 1976, Congress generally reexamined the Sherman and Clayton Acts, but did not enact an express contribution provision such as that previously passed with regard to the securities laws. See page 4, *supra*. In fact, rather than acting to ameliorate the consequences of liability under the antitrust laws, Congress sought to enhance the potential liability of violators such as petitioner. See Antitrust Procedures and Penalty Act of 1974, Pub. L. No. 93-528, Section 3, 88 Stat. 1706, 1708 (increasing penalties under the Sherman Act); 120 Cong. Rec. 36338-36339 (1974) (remarks of Rep. Rodino); Antitrust Improvements Act of 1976, Pub. L. No. 94-435, Title III, Section 4C, 90 Stat. 1394-1395 (authorizing state attorneys general to sue for Sherman Act violations and to recover for monetary damages without proof of individualized injury in price fixing cases). And although the rule against contribution in antitrust cases was firmly entrenched in the federal courts at that time (see, *e.g.*, *Goldlawr, Inc.* v. *Shubert*, 276 F.2d

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cases as well. See, *e.g.*, *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, *supra*; *Union Stock Yards Co.* v. *Chicago, Burlington & Quincy R.R.*, *supra*; *Chicago City* v. *Robbins*, *supra*; *Easterbrook, Landes and Posner*, *supra*, 23 J. L. & Econ. at 332-334; Note, *A Case Against Contribution in Antitrust*, 58 Tex. L. Rev. 961-967 & n.48 (1980). We further note that petitioner has in any event engaged in intentional misconduct. See note 1, *supra*.

614, 616 (3d Cir. 1960); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969); Pet. App. A-3 to A-4 & n.4 (collecting cases)), Congress expressed its view that the existing treble damages remedy is both a necessary and satisfactory deterrent against antitrust violations. See S. Rep. No. 94-803, 94th Cong., 2d Sess. 45 (1976); H.R. Rep. No. 94-499, 94th Cong., 1st Sess. 13-15 (1975).

Indeed, the 96th Congress expressly considered the issue of contribution, but declined to enact legislation that would have allowed co-conspirators to seek contribution from each other. Thus, in 1979, a bill was introduced in the Senate providing for contribution based on "the damages attributable to each [co-conspirator's] sales or purchases." S. 1468, 96th Cong., 1st Sess. 1 (1979). See also S. 390, 96th Cong., 1st Sess. (1979) and H.R. 6792, 96th Cong., 2d Sess. (1980). Following hearings on the Senate bill (*Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979) (hereinafter "*Hearings on S. 1468*"), a sharply divided Senate Judiciary Committee recommended passage of the legislation. See. S. Rep. No. 96-428, 96th Cong., 1st Sess. (1979). The Senate Report observed that the majority of courts had denied a right to contribution under the antitrust laws because Congress had previously failed to indicate its views on this matter (*id.* at 1-2, 9-11) and that "the time has come to supply the appropriate congressional intent" (*id.* at 10). Nonetheless, neither the Senate nor the House bills were enacted.

Although such post-enactment legislative events are not dispositive, the debate regarding S. 1468 highlights the numerous different policy questions that are involved in the contribution controversy. Whether or not to permit contribution in any form raises difficult questions concerning fairness, deterrence, and efficient antitrust enforcement. See, *e.g.*, S. Rep. No. 96-428, *supra*, at 2-3,

13-20, 28-42; *Hearings on S. 1468, supra*, at 5-10, 17-31, 50-58, 62-63, 94-97; ABA, *Report of the Section of Antitrust Law With Legislative Recommendation* (Aug. 17, 1979) (divided recommendation in favor of contribution); pages 10-19, *infra*. Moreover, even assuming that contribution is ever desirable, there is wide disagreement as to the manner in which contribution should be calculated and the circumstances in which contribution should be permissible. For example, in his testimony before the Senate Judiciary Committee, Assistant Attorney General Shenefield explained that contribution might not be appropriate in cases involving criminal or per se unlawful conduct (*Hearings on S. 1468, supra*, at 7-8), and that contribution could be determined on a pro rata, comparative fault, market share, or other basis (*id.* at 8). Other substantial questions exist with regard to the procedures to be followed in determining contribution shares and the treatment to be afforded settling defendants (*id.* at 8-10).[7]

In the absence of any evidence of congressional intent to permit contribution under the Sherman and Clayton Acts, we submit that the Court should not disturb the longstanding rule against contribution in antitrust cases and, in the first instance, attempt to resolve the difficult and essentially legislative issues outlined briefly above. As the Court recently remarked in similar circumstances, "[b]y now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases advise, we should stay our hand in these circumstances." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256,

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[7] The majority of the Senate Judiciary Committee recommended that, except as to settling defendants, contribution be permitted on the basis of market share in all antitrust cases. See S. Rep. No. 96-428, *supra*, at 4. The Minority Senate Report recommended against contribution in price fixing cases and endorsed a comparative fault method for allocating contribution shares. See *id.* at 28-29. See also pages 25-27, *infra*.

273 (1979) (footnote omitted). See, *e.g.*, *United States* v. *Topco Associates*, 405 U.S. 596, 611 (1972); *United States* v. *Gilman*, *supra*, 347 U.S. at 511-513. *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, *supra*, 342 U.S. at 285-286.

B. Contribution Is Not Necessary To Effectuate Any Purpose Of The Antitrust Laws, And Such A Remedy Would Undermine Efficient Antitrust Enforcement

Because petitioner is not among the statute's intended beneficiaries, and because there is no evidence in the legislative history that Congress meant to create a right of contribution in its favor, there may be no need to inquire whether recognition of such a remedy is necessary to achieve the purposes of the statute. See *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 575-576; see also *id.* at 579-580 (Brennan, J., concurring). In any event, petitioner has wholly failed to demonstrate that an implied contribution remedy is "necessary to effectuate Congress' goals" under the antitrust laws. *Piper* v. *Chris-Craft Industries*, *supra*, 430 U.S. at 25-26, 41. Analysis of the practical effect of a contribution remedy demonstrates that such a remedy would not be helpful in achieving those goals. To the contrary, it would undermine effective statutory enforcement. This analysis fortifies the inference derived from statutory text and legislative history that Congress did not intend to authorize contribution claims among antitrust violators.

1. The decisions of this Court establish that Congress had a two-fold purpose in prescribing a private treble damage remedy under the antitrust laws—to compensate the victims of antitrust violations, and to deter potential offenders. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, *supra*, 429 U.S. at 485-486; *Pfizer, Inc.* v. *Government of India*, *supra*, 434 U.S. at 314. Granting a contribution remedy to antitrust defendants clearly would not promote the goal of compensating the victims of anti-

trust violations.[8] And petitioner has not sustained the burden of establishing that it would increase deterrence of antitrust violations.

At present, there is little empirical evidence bearing on the question whether contribution would weaken or strengthen deterrence, or leave it unaffected. Clashing assertions have been made by federal judges,[9] members of Congress,[10] participants in congressional hearings,[11]

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[8] To the contrary, as explained on pages 15-19, *infra*, recognition of a contribution remedy would undercut the ability of treble damage plaintiffs to obtain the compensation mandated by Congress.

[9] In the present case, the majority concluded that contribution would undermine deterrence (Pet. App. A-8), while Judge Morgan, dissenting and concurring, concluded that the effect of contribution on deterrence is inconclusive (*id.* at A-21 to A-22). In *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979), the majority concluded that contribution may buttress deterrence, while Judge Hanson, in dissent, concluded that the effect on deterrence was inconclusive (*id.* at 1189). In *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,703 (10th Cir. 1979), the majority concluded that the effect of contribution on deterrence was speculative, while Judge Holloway, dissenting and concurring, stated that contribution could enhance deterrence (*id.* at 79,706-79,707). See also *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339, 1346 (S.D.N.Y. 1979) (concluding that contribution would interfere with the deterrent purpose of the antitrust laws); *El Camino Glass* v. *Sunglo Glass Co.*, [1977-1] Trade Cas. (CCH) ¶ 61,533, at 72,112 (N.D. Cal. 1976) (concluding that contribution could undermine deterrence).

[10] Compare the views of the Senate Judiciary Committee on S. 1468, S. Rep. No. 96-428, 96th Cong., 1st Sess. 17-19 (1979) (concluding that contribution in price fixing cases may strengthen deterrence), with the supplemental views of Senators Kennedy and Metzenbaum, *id.* at 29, 32 (concluding that contribution and mandatory claims reduction could undercut deterrence).

[11] See *Hearings on S. 1468, supra*: statement of John Shenefield, Assistant Attorney General (*id.* at 27-28) (expressing the view that contribution may weaken the deterrent to intentional

and commentators.[12] To the extent that any consensus can be drawn from these disparate views, it is that neither economic theory nor other available tools of analysis provide an unambiguous answer.

There is, therefore, little basis at present for the assertion that antitrust violators, particularly substantial business firms, are encouraged to violate the law in the belief that, if the violation is discovered, they may escape liability while somebody else is forced to satisfy the damage claim.[13] To the extent that the traditional rule against contribution has any effect on potential intentional violators, the United States believes that it is more likely that the risk of bearing a disproportionately

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violations); statement of Lowell Sachnoff (*id.* at 50, 62), statement of Harold Kohn (*id.* at 92-93, 109), statement of Donald Polden (*id.* at 144-146), and letter of Mark Green (*id.* at 198-200) (all expressing the view that contribution will undermine the deterrent effect of the antitrust laws). Compare: statement of Robert Taylor (*id.* at 73-76), statement of Donald Kempf (*id.* at 66, 69-70), statement of Donald Hibner (*id.* at 118) (arguing that contribution may enhance deterrence).

[12] See Note, *Contribution in Private Antitrust Actions*, 93 Harv. L. Rev. 1540, 1544-1548 (1980) (concluding that contribution would not materially reduce deterrence); Easterbrook, Landes, and Posner, *supra*, 23 J. L. & Econ. at 349-350, 351-353, 365-368 (concluding that contribution would not increase and may well decrease deterrence); Rose, *Contribution in Antitrust: Some Policy Considerations*, 48 Antitrust L. J. 1605, 1614-1615 (1930) (concluding that the effects of contribution on deterrence are indeterminate); Note, *supra*, 58 Tex. L. Rev. at 969-979 (concluding that contribution would undermine deterrence).

[13] It is not likely that antitrust plaintiffs would ignore the largest potential defendants while looking to smaller defendants for their recoveries. A plaintiff ordinarily would be able to obtain the largest damage awards from the largest firms in an industry. Such firms therefore have little reason to anticipate that they would escape liability while smaller defendants are pursued for treble damages. See James, *Contribution Among Joint Tortfeasor: A Pragmatic Criticism*, 54 Harv. L. Rev. 1156, 1167 (1941).

large share of the damages liability encourages adherence to the law, particularly to the extent that corporate managers are "risk averse"—*i.e.*, are more fearful of a large penalty of less certain application than a small, more certain penalty shared with other violators.[14] A rule authorizing contribution might also reduce deterrence because it would remove the threat that a violator would be competitively disadvantaged by a disproportionately large damage award. To the extent that damages are apportioned among industry members, they become a common cost of doing business which, depending on the elasticity of consumer demand, may be recouped in whole or in part from each firm's customers in the form of increased prices. For these reasons, we think it most unlikely that a right to contribution would increase the effectiveness of treble damage actions as a deterrent to antitrust violations.[15]

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[14] See Easterbrook, Landes, and Posner, *supra*, 23 J. L. & Econ. at 351-353, 365; Note, *supra*, 58 Tex. L. Rev. at 973-977.

[15] Petitioner has the burden of demonstrating that the implied remedy it seeks is necessary to effectuate the congressional goal of deterrence. *Piper* v. *Chris-Craft Industries, Inc.*, *supra*, 430 U.S. at 25-26. In view of the treble damage penalty, the availability of class action procedures under Fed. R. Civ. P. 23, the parens patriae authority conferred on state attorneys general (see 15 U.S.C. 15c-h), and the recent increase in criminal sanctions under the antitrust laws (see 15 U.S.C. 1, 2), it would be difficult to maintain that contribution is in fact necessary to achieve the level of deterrence desired by Congress. Congress has adopted the combination of sanctions and remedies that it believes to be appropriate to achieve the statutory goal, and it did so in an environment in which antitrust contribution was unknown (see pages 6-8, *supra*). Moreover, in contrast to cases such as *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 706-709; *Allen* v. *State Board of Elections*, 393 U.S. 544, 577 n.23 (1969); and *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964), the federal authorities charged with enforcing the statute do not believe that an implied right of contribution is necessary to or helpful in achieving the goal of deterrence. As noted above, the United States is of the view that contribution would likely *decrease*, rather than increase, deterrence.

2. Some proponents of contribution have advanced the theory—a theory at odds with the view that contribution is needed to increase deterrence—that contribution is a salutary means of reducing what they view to be "over-deterrence" resulting from existing treble damage liability. Joint and several liability, it is argued, creates such enormous risks that businessmen may refrain from engaging in innovative activity even arguably at odds with the antitrust laws. By lowering the liability ceiling for antitrust violators, it is argued, a right to contribution would encourage bolder business activity near the boundary of lawfulness but short of any actual transgression.[16]

Even if the premise of that contention were accepted,[17] an implied right to contribution would not remedy the problem of uncertainty. It would merely lower the penalty for guessing wrong. Contribution would not make it any easier for businessmen to decide in advance whether a proposed course of action would violate the antitrust laws. Certainty under the antitrust laws must be pursued through progressive elaboration of legal standards by the courts and Congress, supplemented by announcement of enforcement policies by government officials. Moreover, the present case involves an alleged price fixing conspiracy, the participants in which already have pleaded *nolo contendere* in a criminal prosecution. In this context, there is little reason to modify prevail-

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[16] See, *e.g.*, S. Rep. No. 96-428, *supra*, at 18; *Hearings on S. 1468*, *supra*, at 73 (statement of Robert Taylor); *id.* at 163 (statement of Continental Group). As previously noted, we agree that a right of contribution would, in all likelihood, reduce the level of deterrence provided under the antitrust laws.

[17] The premise appears to be that innovative business practices often are subject to attack under the antitrust laws. While antitrust litigation occasionally involves what might be viewed as an innovative practice, it has been the United States' experience that the great majority of antitrust suits challenge familiar practices such as price fixing or stabilization, market and customer allocation, group boycotts, and exclusive dealing contracts.

ing legal doctrine to mitigate purported "over-deterrence" of arguably lawful conduct. Price fixing is a *per se* offense, not a "gray area" violation.

In addition, as we have noted above, it is indisputable that Congress prescribed the treble damages remedy in a legal environment in which contribution for analogous torts was unknown. Congress has since amended the antitrust laws with full awareness of the existence of class actions under the Federal Rules of Civil Procedure. And it has strengthened the deterrent impact of the treble damage action by creating parens patriae remedies for the attorneys general of each state (15 U.S.C. 15c-h). The level of deterrence created by these provisions is a reflection of Congress' decision to "encourag[e] vigorous private enforcement of the antitrust laws." *Illinois Brick Co.* v. *Illinois*, *supra*, 431 U.S. at 745.[18] In these circumstances, creation of a right to contribution to reduce deterrence in "gray area" cases would be unfaithful to the congressional purpose. While Congress is free to reduce deterrence by prescribing a right to contribution (see pages 3-4, 8-9, *supra*), the judiciary should not find such a right to be implied on the premise that existing legislation results in "over-deterrence."

3. We are also concerned that judicial recognition of a right to contribution may discourage injured parties from bringing antitrust actions and obstruct the efficient administration of the antitrust laws in the district courts.

If antitrust defendants were permitted to assert cross or third-party claims for contribution, some or all of the

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[18] This Court has admonished against modifying substantive antitrust law to rectify perceived problems arising from class actions. *Reiter* v. *Sonotone Corp.*, *supra*, 442 U.S. at 344-345; see also *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 339 (1980) (noting that the remedy for class action abuses lies in a re-examination of Rule 23, not in distortion of other sound legal principles). When Congress has wished to restrict damage recoveries in class actions, it has done so expressly. See, *e.g.*, 15 U.S.C. 1640(a)(2)(B).

defendants would file such claims against each other. Each contribution complaint also could name previously unnamed third-party defendants, alleged to be involved in some facet of the alleged conspiracy.[19] Individuals also could be joined as defendants, adding substantially to the number of cross-claims and third-party claims.[20] Such contribution claims could be expected to spawn protracted disputes over whether antitrust defendants were involved in single or multiple conspiracies and the contours of the product and geographic markets involved, and each such claim could be expected to produce additional demands for and disputes over pretrial discovery. Moreover, companies not named as defendants might seek to intervene

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[19] In a major price fixing case, the number of cross and third party claims would be very large. For example, in *In re Corrugated Container Antitrust Litigation*, 84 F.R.D. 40 (S.D. Tex. 1979), aff'd, 606 F.2d 319 (5th Cir. 1979), cert. dismissed, No. 79-972 (Oct. 20, 1980), the complaint named 38 defendants. Each defendant could seek contribution from each of the others. Each could also seek to implead still other industry members and individuals responsible for pricing decisions. The named defendants in that proceeding estimated that there were as many as 1000 competing companies in the industry that could have been joined as third party defendants (C.A. Br. 17).

[20] The incentive to add far-reaching contribution claims would be substantial. See Cellini, *The Effect of Contribution on Litigation and Settlement: The Defendant's Viewpoint*, 48 Antitrust L. J. 1599, 1603-1604 (1980): "each such claim could mean a significant reduction in liability for a defendant faced with paying a treble damage award. After all, with contribution, the risk gets smaller as the conspiracy gets larger. * * * Should you assert a contribution claim against the entire industry? Well, if you view the situation solely from the standpoint of reducing your client's ultimate liability, either in a settlement package or for a judgment that may be rendered against your client, the answer would have to be yes. It seems to me you would be under an obligation to your client to fully exploit any connection you could find * * * between any other entity and the conspiracy your client has been charged with. That means many, many more companies are going to find themselves embroiled in antitrust litigation all over the country."

in cases involving charges of an industry-wide conspiracy. Such potential intervenors may conclude that their chances of defeating the plaintiff are better than their chances of defeating the original defendants, who are likely to know better than the plaintiff the participation and role of each of the conspirators.

It is by now a common-place observation that major antitrust litigation in the federal district courts is protracted and complex. The addition of contribution claims would undoubtedly make it more burdensome. The Eighth Circuit suggested in *Professional Beauty Supply, Inc., supra*, that undue burdens on plaintiffs could be mitigated by appropriate use of severance and other litigation management techniques (594 F.2d at 1184).[21] The Fifth Circuit in this case was not so sanguine; it feared that at least some adverse impact on litigation management would result (Pet. App. A-16 to A-18). In the absence of concrete experience, it is difficult to predict the extent to which the increased complexity of antitrust litigation would affect plaintiffs and the incentive to seek redress for antitrust injuries. At a minimum, however, it may be predicted that the adversary relationship between defendants asserting contribution claims against each other would deprive district courts and antitrust plaintiffs of litigation efficiencies previously engendered by cooperative defense efforts. The absence of coordinated defense efforts would prolong discovery and cause continuing problems both before and during trial.[22] Thus, even if certain

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[21] Judge Hanson's dissenting opinion disagreed: "It is not difficult to conceive of many circumstances in which the original plaintiff may simply be overwhelmed by embroilment in a lawsuit of a scope and size it never contemplated and is ill-equipped to handle. * * * Aware that litigation may spiral out of their control, it is foreseeable that some plaintiffs will decide to forego a legitimate cause of action." 594 F.2d at 1190.

[22] As Judge Singleton noted in *In re Corrugated Container Antitrust Litigation, supra*, 84 F.R.D. at 41, "joint defense efforts, with their savings in court, staff, and attorney time, would be hin-

contribution issues could be severed for post-trial resolution, it is predictable that the existence of cross and third-party claims would nonetheless complicate and delay antitrust actions to the detriment of injured persons seeking an expeditious remedy.

Finally, even if contribution claims could effectively be severed from the plaintiff's original action, that would only delay the ultimate reckoning for the district court. Following the completion of the original litigation, the district court would be required to adjudicate the claims of the conspirators against each other, after conducting discovery on the issues raised by the various cross, counter and third-party complaints. After determining which of the parties participated in the conspiracy, the court would be required to apportion damages on the basis of relative fault, volume of sales, or some other standard. Much of the proof in the severed contribution trial would duplicate the proof presented in the original trial, although—due to the potentially large number of defendants involved—the contribution trial could greatly exceed the scope and complexity of the original trial. In short, the resolution of contribution claims, whether in the original proceeding or in a separate deferred proceeding, "would greatly complicate and reduce the effectiveness of already protracted treble-damages proceedings" (*Illinois Brick Co.* v. *Illinois*, *supra*, 431 U.S. at 732). It should not lightly be presumed that Congress intended to "transform treble-damages actions into massive multiparty litigations" (*id.* at 740), with substantial new "costs to the judicial system and the efficient enforcement of the antitrust laws" (*id.* at 732; see also *id.* at 745-746).[23] In view of the present length and complexity of

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dered or deterred altogether." He added that contribution would "inhibit joint defense efforts to such an extent that this type of litigation would be virtually impossible to manage."

[23] Recent antitrust legislation manifests Congress' determination to "expedite and reduce the cost of antitrust litigation." See Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, 94

antitrust treble damage litigation, there is no reason to countenance such a danger, particularly in the absence of any convincing demonstration that contribution is necessary to serve the goals of the antitrust laws.[24]

C. Courts Should Not Create Implied Contribution Rights To Remedy Perceived Unfairness Resulting From Application Of Federal Statutes

In recognizing a contribution right in *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, *supra*, 594 F.2d at 1185-1186, the Eighth Circuit made no attempt to divine the intent of Congress by applying the analytical method prescribed in *Cort* v. *Ash*, 422 U.S. 66 (1975), and its progeny. Instead, it relied to a considerable extent on its own sense of "fairness" to justify creation of a federal common law right of contribution. "Contribution," it declared, is "an equitable doctrine based on the principle of justice between the parties" (594 F.2d at

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Stat. 1154 (preamble). In passing this statute, Congress decried the "extraordinary length and excessive cost of many antitrust cases," which "present serious obstacles to the effective enforcement of the antitrust laws." S. Rep. No. 96-238, 96th Cong., 1st Sess. 1 (1979). In simple terms, "[a]ntitrust cases take far too long to litigate." *Id.* at 3.

[24] No court, other than the Eighth Circuit in *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, *supra*, has permitted antitrust defendants to seek contribution from other violators. See *In re Corrugated Container Antitrust Litigation*, 84 F.R.D. 40 (S.D. Tex. 1979), aff'd, 606 F.2d 319 (5th Cir. 1979), cert. dismissed, No. 79-972 (Oct. 20, 1980); *In re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979); *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, [1979-2] Trade Cas. (CCH) ¶ 62,995 (10th Cir. 1979); *In re Fine Paper Antitrust Litigation*, No. MDL 323 (E.D. Pa. Aug. 3, 1979); *Alabama* v. *Blue Bird Body Co.*, No. 75-23-N (M.D. Ala. 1979), appeal pending, No. 79-2667 (5th Cir.); *Hedges Enterprises* v. *Continental Group, Inc.*, [1979-1] Trade Cas. (CCH) ¶ 62,717 (E.D. Pa. 1979); *In re Ampicillin Antitrust Litigation*, 82 F.R.D. 647 (D.D.C. 1979); *El Camino Glass* v. *Sunglo Glass Co.*, [1977-1] Trade Cas. (CCH) ¶ 61,533 (N.D. Cal. 1976); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969).

1185). That reasoning, we submit, misconceives the role of the federal judiciary in construing statutes enacted by Congress.

1. Federal courts are entrusted with expounding and applying federal statutes, but are not vested with a roving commission to improve upon legislation by enforcing judicially defined policies of fairness. See generally *TVA* v. *Hill*, 437 U.S. 153, 194-195 (1978). Thus, in *Touche Ross & Co* v. *Redington*, *supra*, 442 U.S. at 578-579, this Court held that defrauded investors had no right to seek redress for violations of Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78q(a), even though they claimed that denial of a remedy "sanctions injustice" (442 U.S. at 579). The Court explained (*ibid.*, emphasis deleted; cite omitted):

> [E]ven if that were the case, the argument is made in the wrong forum, for we are not at liberty to legislate. If there is to be a federal damages remedy under these circumstances, Congress must provide it. "It is not for us to fill any hiatus Congress has left in this area."

The Court added that the "ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law" (*id.* at 578). A contrary approach would permit federal courts to exercise legislative powers, since concepts of "fairness" are virtually standardless and without limit.

Allowance of a federal common law right to contribution for antitrust violations can scarcely be likened to "interstitial" law-making through "molecular" additions to a statute. See *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). There is no gainsaying that implication of a contribution right for antitrust defendants would constitute judicial prescription of a wholly new policy—equity among antitrust violators—a policy that has no basis in the objectives of existing legislation. In view of the traditional rule against contribution under the antitrust laws, and the recent debate

in Congress surrounding contribution,[25] the issue of "fairness" should be left to the legislature. See *United States* v. *Gilman*, *supra*, 347 U.S. at 511-513; *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, *supra*, 342 U.S. 285.[26]

2. Implying a federal common law right of contribution in antitrust cases based on judicial perceptions of "fairness" is particularly hazardous in antitrust cases, since fairness arguments often cut both ways.

A substantial portion of treble damages actions involve intentional violations of the antitrust laws.[27] Traditionally, considerations of fairness have not been thought to require contribution in cases of intentional or reckless wrongdoing. To the contrary, fairness to the public demands that those who behave in intentional violation of

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[25] See pages 7-9, *supra*.

[26] Some lower courts have construed this Court's decision in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942), as a mandate for implying a contribution remedy to assure fairness among antitrust violators. See, *e.g.*, *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, *supra*, 594 F.2d at 1182 n.3. But *Sola* provides no such mandate. *Sola* held that a patent licensee could defend a contract action brought by a patent holder on the ground that the contract contained a price fixing provision in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Section 1 declares that every contract in restraint of trade is "illegal." The Court held that when a federal statute condemns an act as illegal, the nature of the legal consequences that attend that condemnation "are to be derived from the statute and the federal policy which it has adopted." 317 U.S. at 176. By permitting the licensee to defend on grounds of contract illegality, the Court simply gave force to Congress' express declaration. This Court did not suggest that district courts, in the interest of assuring "fairness," may fashion contribution remedies without support in the text, history, or purpose of the federal antitrust laws.

[27] An exhaustive study of private treble damage actions filed in the Northern District of Illinois disclosed that approximately 50 percent of those cases involved allegations of *per se* violations. See DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (I)*, 3 American Bar Foundation Research J., 1021, 1093 (Table 30) (1976). Other alleged violations may, of course, also involve intentional misconduct.

the law feel the full consequences of their misdeeds.[28] This reasoning applies to persons who engage in price fixing conspiracies. In conspiracy cases, the actions alleged are intentional: there is "no such thing as an 'unwitting conspirator'." *United States* v. *Standard Oil Co.*, 316 F.2d 884, 890 (7th Cir. 1963) (cite omitted). Moreover, quite apart from the public injury resulting from price fixing and the need to maximize deterrence in such cases, it is fair to require any participant in the conspiracy to make good the damages caused by the conspiracy since participation by each member often is essential to produce the injury. See *Perma Life Mufflers* v. *International Parts Corp.*, *supra*, 392 U.S. at 144 (White, J., concurring).[29]

Finally, "fairness" arguments advanced by proponents of contribution ignore the unfairness that their proposed procedures would impose on other litigants. Persons injured by antitrust violations could be exposed to additional delay and complication in vindicating their claims, as previously discussed. And litigants in other proceedings, who must rely on the limited resources of the already burdened judicial system, would be exposed to even greater delays and inconveniences while antitrust violators litigated among themselves their respective rights and liabilities. See Easterbrook, Landes and Posner, *supra*, 23 J. L. & Econ. 331, 339-344 (1980).

3. Concern also has been voiced that the traditional rule against contribution in antitrust cases permits "coercion" of innocent defendants, who enter into settlements to avoid increased exposure to damages after their co-

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[28] See W. Prosser, *Law of Torts* § 50 at 308 (1971); *Restatement (Second) of the Law of Torts* § 886A(3) and Comment 337, 342 (1977); *1955 Uniform Contribution Among Tortfeasor's Act* § 1(c) and Commissioners' Comment, 12 U.L.A. Civil Proc. and Rem. Laws 57, 63, 65 (1975); note 6, *supra*.

[29] If a competitor in a price fixing conspiracy insists on price competition, the conspiracy will fail or the uncooperative competitor will increase its market share to the detriment of the remaining conspirators. The conspiracy would not likely survive in such circumstances.

defendants settle with the plaintiff.[30] The factual basis for this assertion is subject to debate.[31] There is no reliable method for demonstrating the innocence of an alleged antitrust violator who foregoes the opportunity to establish its innocence in court.[32] Without denying the possibility that some innocent defendants have been compelled to enter into settlements that they would otherwise not make to avoid the mounting exposure to damages that results from settlements by their co-defendants, we suggest that there is simply inadequate proof that the problem occurs, or that if it does occur that it occurs frequently enough to justify imposition on litigants and the judicial system of the substantial costs that would result from an implied remedy for contribution. As this Court concluded in *Illinois Brick Co.* v. *Illinois*, *supra*, 431 U.S. at 746-747, considerations of litigation management and conservation of judicial resources must be weighed against the elusive goal of perfect fairness in particular cases.[33]

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[30] See S. Rep. No. 96-428, *supra*, at 13-17; *Hearings on S. 1468*, *supra*, at 64-68 (statement of Donald Kempf); *id.* at 118, 120-121 (statement of Donald Hibner).

[31] See S. Rep. No. 96-428, *supra*, at 37-38 (supplemental views of Senators Kennedy and Metzenbaum); *Hearings on S. 1468*, *supra*, at 95-97; 104-107, 188-191 (statement and letter of Harold Kohn refuting allegations of unfairness). See also DuVal, *The Class Action as An Antitrust Enforcement Device: The Chicago Experience (II)*, 4 American Bar Foundation Research Journal 1273, 1344, 1346 (1976) (finding little support for the contention that private treble damage class actions, brought in the Northern District of Illinois, coerced defendants into settling regardless of the merits of the plaintiff's claim).

[32] Any decision to settle requires an assessment by both the plaintiff and the defendant of a variety of factors, including the law and the facts, court costs, attorneys' fees, inconvenience, and the uncertainties inherent in litigation. See generally, R. Posner, *Economic Analysis of Law* 434-441 (1977).

[33] This Court has not been willing to modify sound legal principles merely to strengthen the litigation position of plaintiffs, who sometimes have contended that existing law precludes the assertion of meritorious claims. See, *e.g.*, *Coopers & Lybrand* v. *Livesay*, 437

In any event, remedies for potential "coercion" from meritless antitrust complaints "can more directly be achieved with other, less drastic means more closely tailored to the precise congressional goal" underlying the antitrust laws.[34] *Piper* v. *Chris-Craft Industries, Inc.*, *supra*, 430 U.S. at 40. While summary judgment should be granted sparingly in complex antitrust cases (*Poller* v. *CBS, Inc.*, 368 U.S. 464, 472-473 (1962)), defendants faced with unsubstantiated antitrust claims may obtain summary judgment and thereby avoid the uncertainties and pressures of trial. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 284-290 (1968); *Havoco of America* v. *Shell Oil Co.*, No. 79-1261 (7th Cir. July 10, 1980), slip op. 4-5. In addition, district courts may utilize Fed. R. Civ. P. 23 to prevent harassment of defendants by frivolous class action complaints. As this Court observed in *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345 (1979), "[d]istrict courts must be especially alert to identify frivolous claims brought to extort nuisance settlements; they have broad power and discretion vested in them by [Rule 23 of the Federal Rules of Civil Procedure] with respect to matters involving the certification and management of potentially cumbersome or frivolous class actions." Moreover, even after a case has been certified as a class action, district courts retain authority under Rule 23(e) to supervise settlements and to prevent improper coercive behavior. *In re Fine Paper Antitrust Litigation*, No. MDL-323 (E.D. Pa. Aug. 3, 1979), slip op. 3.

U.S. 463, 473-477 (1978); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 175-176 (1974). For similar reasons, unsubstantiated claims of coerced settlements from antitrust defendants provide no justification for creating, by judicial implication, a right to contribution involving the administrative difficulties we have discussed.

[34] Indeed, the availability of contribution against non-settlors, but not against settlors (see pages 25-27, *infra*) arguably might induce innocent persons the plaintiff would not otherwise have sued to seek settlements with the plaintiff in order to avoid contribution claims.

Finally, antitrust defendants are not powerless to protect themselves against large, disproportionate liabilities. By contracts, known as "sharing agreements," they may allocate the risk of liability among themselves. Such contractual arrangements typically bind the participating defendants to contribute proportionately to the payment of any judgment rendered against any of them.[35] Even in the absence of a sharing agreement, moreover, the amount paid by settling defendants is always subtracted from the plaintiff's recovery against the remaining defendants to prevent double recovery. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971). This serves to reduce the economic exposure of those defendants who do not settle but instead elect to stand trial.

In sum, the problem of potential coercion in antitrust cases can be remedied in substantial part by currently available legal tools and contractual arrangements, without the complications that would result from implying contribution remedies among antitrust defendants.

D. If A Right To Contribution Is Recognized In Antitrust Cases, It Should Not Be Available To Intentional Antitrust Violators And Should Not Be Assertable Against Settling Defendants

If, contrary to the views expressed above, the Court concludes that Congress did intend to vest antitrust violators with a right to contribution in some cases, the Court should impute such an intent to Congress only in cases in which contribution would be least likely to undermine the statutory goal of deterrence or discourage settlements between plaintiffs and defendants. There is no reason to believe that, if Congress intended to create a right to contribution, it would have wished either to disrupt settlements negotiated in good faith or to under-

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[35] See ABA, *Report of the Section of Antitrust Law With Legislative Recommendation* (Aug. 17, 1979), "Minority Report on Contribution," at 10.

cut deterrence by providing contribution rights to intentional antitrust violators.

1. This Court has recognized that settlements in antitrust cases are in the public interest. *Zenith Radio Corp.* v. *Hazletine Research, Inc.*, 401 U.S. 321, 346-347 (1971); see also *Williams* v. *First National Bank of Pauls Valley*, 216 U.S. 582, 595 (1910). Settlements offer antitrust defendants the benefit of avoiding litigation costs and eliminating uncertainties concerning liability and damages. If contribution were permitted against settling defendants, those benefits would vanish and settlement incentives would be significantly reduced.[36] The resulting burden on the courts would compound the current problem of crowded dockets. And, if settlements were discouraged, the statutory goal of compensating injured persons on an expeditious basis would be undermined. Plaintiffs would be subjected to needless delay and expense by being forced to litigate cases that could have been settled prior to trial.[37] Accordingly, the United States believes that contribution should never be per-

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[36] See *Sabre Shipping Corp.* v. *American President Lines, supra*, 298 F. Supp. at 1346. "No defendant would settle * * * if he was to find himself back in the suit as a third party defendant." See also Easterbrook, Landes and Posner, *supra*, 23 J. L. & Econ., at 362. A disincentive to settlement also would be created by recognition of a "claims reduction" defense, which would reduce the liability of non-settling defendants by the portion of the total damages attributable to the settling defendants. A plaintiff would be reluctant to compromise a claim against one defendant (particularly a defendant with a large share of the market) if that would adversely affect his right to recover against co-conspirators and require him to participate in litigation concerning the settling defendant's proportionate share of the damages. See *Hearings on S. 1468, supra*, at 29 (statement of John Shenefield, Assistant Attorney General); *id.* at 95 (statement of Harold Kohn).

[37] A substantial percentage of large treble damage actions result in settlements. See *Hearings on S. 1468, supra*, at 94-97 (statement of Harold Kohn); DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (II)*, 4 American Bar Foundation Research Journal 1273, 1309-1327 (1976).

mitted against a defendant who has negotiated a settlement in good faith. See *Sabre Shipping Corp.* v. *American President Lines*, *supra*, 298 F. Supp. at 1346; *Hedges Enterprises* v. *Continental Group, Inc.*, *supra*, [1979-1] Trade Cas. (CCH) at 77,993; see also 1955 Uniform Contribution Among Tortfeasors Act § 4 and Commissioners' Comment, 12 U.L.A. Civ. P. and Rem. Laws 57, 98-100 (1975).[38]

2. Intentional violators of the antitrust laws, *i.e.*, those who act with a purpose unreasonably to restrain competition or who have reason to know that their conduct will have such an effect, pose the greatest danger to a competitive economy. They are most likely to be deterred from calculated violations by private treble damage liability, unmitigated by offsetting contribution rights.[39] In addition, no consideration of fairness militates in favor of contribution in such cases. See pages 21-22, *supra*.

In the present case, petitioner is alleged to have engaged in price fixing, an intentional violation. See *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 440 (1978); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 213, 218-228 (1940). Contribution should not be available to diminish petitioner's exposure to damages for engaging in a price fixing conspiracy. Thus, even if contribution is available in other categories of antitrust cases, the court of appeals correctly concluded that it is unavailable here.

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[38] The petitioners in *Westvaco Corp., et al.* v. *Adams Extract Company*, No. 79-972, cert. dismissed, Oct. 20, 1980, contended that contribution should be available even against settling defendants. However, the case they relied on (*Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, *supra*, 594 F.2d at 1184) recognized the need to "protect the rights of settling defendants."

[39] See *Hearings on S. 1468*, *supra*, at 27-28 (statement of John Shenefield), *id.* at 62 (statement of Lowell Sachnoff).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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